CANADIAN LEGISLATION FOR CONSERVATION COVENANTS, EASEMENTS AND SERVITUDES

The Current Situation

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Thea M. Silver
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Kenneth W. Cox

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FOREWORD

Over the past few decades, governments have found it easier to operate in a leading, control mode for conservation; establishing regulations, allocating funding and providing on-the-ground program delivery. Landowners and the Canadian public have balked a bit at the regulatory approach, but in large part have agreed that senior governments have played a major role in carrying out conservation activity.

But the 1990s have changed all that. Now, there is a general malaise and disillusionment with government, significant financial constraints on once pervasive agencies, ongoing degradation of resources and loss of biodiversity, and a recognition that not all land of conservation interest could - or should - be owned by a public entity. In fact, many private landowners and their families have demonstrated good stewardship over the years, in contrast to some poor management examples on public lands.

Against this context, the 1990s have been termed the "turnaround decade" for the conservation of wildlife and wild places. We must either break through our jurisdictional gridlock and accomplish what is necessary over these next few years, or we will lose much of our ecological heritage and its myriad strands and surprises.

We must either break through our jurisdictional gridlock and accomplish what is necessary over these next few years, or we will lose much of our ecological heritage and its myriad strands and surprises.

How do we do it? The use of conservation covenants, easements and servitudes is an example of the latest, albeit rediscovered, approach to overcoming these obstacles: "partnership". A landowner and a conservation-minded organization reach an agreement on how to manage the features on the land, and continue with this arrangement, with adjustments, long into the future. These agreements enable the needs of all participants to be met, establish a private, on-going relationship, and do so often at reduced costs, thus meeting the conservation challenges of today. Further, both private and public individuals and organizations usually can participate in this flexible, legally-binding, yet creative conservation technique.

But for anyone to use conservation covenants, easements and servitudes, legislation is needed to authorize removal of limitations in common and civil law. The country's important first summary and call for action on such legislation was Oriana Trombetti and Kenneth W. Cox's 1990 *Land, Law and Wildlife Conservation: The Role and Use of Conservation Easements and Covenants in Canada*. Only five years after this piece, much on this front has advanced or is in transition across Canada. Since 1990, legislative amendments for conservation covenants and easements have been passed in British

Columbia, Yukon, Manitoba, Ontario and Nova Scotia, while reforms are being considered in Alberta, Saskatchewan, Quebec, and New Brunswick, with further amendments anticipated in Manitoba.

While many necessary legislative reforms have occurred or are underway, other, albeit limited, statutes were already in place and yet were not applied creatively or comprehensively. With law reforms now settling into place, the real challenge will now be to actually use these mechanisms in each jurisdiction, to promote and elaborate their application. Otherwise, such enabling legislation will languish, and conservation opportunities will be lost.

With use of these tools, however, over time the idiosyncrasies of each statute will become apparent, and lessons will be learned that can be passed along, transcending boundaries. At that point, perhaps a decade or so from now, we undoubtedly will see a second wave of reforms. Then, some standardization of statutes may occur amongst or even beyond Canadian jurisdictions. Along the way, other provisions relating to conservation covenants, easements and servitudes will be administered and amended to better complement these legal interests.

But for now, we - conservationists, land professionals, and especially landowners - need to become more familiar with conservation covenants, easements and servitudes, understand their supporting legislation, and push for reforms where necessary. Then we need to get out there and make these tools work on the landscape. Time is short. Older landowners will be transferring much of their holdings over the next decade, creating a golden opportunity for land securement; and the wealth of biodiversity, especially in southern settled landscapes, is increasingly "losing ground". Conservation covenants, easements and servitudes provide a key new means for seizing this opportunity and stemming these losses. This report brings us all up-to-date on these important legal interests, and demonstrates a renewed energy and excitement for stewardship across Canada.

But for now, we - conservationists, land professionals, and especially landowners - need to become more familiar with conservation covenants, easements and servitudes, understand their supporting legislation, and push for reforms where necessary. Then we need to get out there and make these tools work on the landscape.

Jonathan Scarth
Executive Vice-President
Delta Waterfowl Foundation

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PRÉCIS

During the last decade, there has been increased awareness that certain areas of land, because of special natural or cultural attributes, or value as wildlife habitat, should be protected from development and preserved in their natural state in perpetuity. Large tracts of public land in the less populated regions of Canada have been set aside as parks or ecological reserves; however, protection of smaller parcels of privately-owned ecologically sensitive lands has been more difficult to achieve. A full range of workable institutional arrangements such as conservation covenants, easements and/or servitudes is required to protect these valuable portions of the landscape.

This report reviews the legal development and current legislative status regarding conservation covenants, easements and servitudes in Canada. Section one provides broad, general information; definition, benefits and a discussion of why such tools are necessary. The section also describes common law easements and covenants and discusses stumbling blocks hindering their use as conservation tools. Section two gives a province by province overview of the state of conservation covenant and easement legislation in Canada. For each province and territory, enabling legislation is reviewed and critiqued, and, where applicable, anticipated amendments and modifications are described. A brief section reviewing conservation easement legislation in the United States is also provided. Section three addresses a range of issues that should be considered when preparing conservation covenant and easement legislation. These issues include items specific to the legislation (i.e., purposes, holders, enforcement, registration), as well as related issues pertaining to tax, assessment, planning and other laws.

The authors hope that continuing education on this topic and call for reform will lead to new or revised legislation and complementary changes in related tax, assessment, planning and other laws that can enhance and promote the use of conservation covenants, easements and servitudes as a major tool in the conservation of land across Canada.

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INTRODUCTION

Historically in Canada, the conservation movement, be it governmental or non-governmental, has tended to concentrate on the setting aside of large parcels of land for either parks or ecological reserves. Most of these parks or reserves are in the less populated areas of Canada and contribute significantly to the preservation of representative areas within the ecoregions of Canada. However, the vast majority of Canadians live on about ten percent of the land in southern Canada. In this area, it is difficult to set aside large portions of land because they are actively under some type of intensive use. Also, it is on these privately owned lands where much of our biodiversity is at risk. Considerable interest exists in setting aside portions of this working landscape for conservation purposes. However, the protection of smaller parcels of land that are part of the working landscape has proven to be difficult to achieve.

One of the reasons for the difficulty has been the lack of mechanisms which allow private land groups and private landowners themselves to become full partners with federal, provincial, and municipal governments in the long-term protection of soil, water and wildlife values on those landscapes in Canada that are dominated by private ownership. A full range of workable institutional arrangements such as conservation easements, covenants and/or servitudes is required to protect these valuable portions of ecologically sensitive lands. The past decade has seen a remarkable growth in Canada in the private sector taking an active role in pursuing its own conservation land programming while at the same time creating numerous partnerships with government organizations to help accomplish this objective.

One such movement is the growth right across Canada of private stewardship programs. Options for private landowners under such programs range from landowner contact where a simple handshake and joint agreement to look after the land for a particular purpose is made with the landowner, to short- or medium-term leases or even legal agreements such as a conservation covenant. The corporate sector has also become involved with private groups in an effort to manage certain portions of their corporate-held lands for wildlife habitat or other conservation purposes.

The increase over the past decade, and in particular the last five years, of community-based or region-based conservation efforts has created a growing "land trust" movement in Canada. These trusts are generally dedicated to the conservation of particular natural areas, scenic vistas, wildlife habitats or agricultural lands. While operating for the public good, they are private in nature and to a great extent, like private stewardship programs, they involve the community in partnerships which build on strength in numbers and dedication to a common purpose to achieve their objectives.

A major factor in any of these privately organized, community supported land conservation programs is the institutional arrangement of the province and/or region within which the program has to be implemented. These arrangements (tax, finance, policy, planning, incentives or regulations) have to be made as conservation-friendly as possible. Likewise, federal regulations such as provisions under the *Income Tax Act* are often not as conservation-friendly as they could be if governments were to plan over the long-term for a sustained partnership between the public and private sectors regarding long-term land and wildlife conservation management. This situation, however, appears to be changing and recent amendments to the *Income Tax Act*, such as those announced in the February 1995 federal budget, are aimed at removing barriers to private land conservation. While a start, considerably more attention has to be paid to such acts as the *Income Tax Act*. Further, the ability to establish and hold in perpetuity a conservation covenant or servitude in Canada is one of the institutional arrangements that needs continuing review and reform if private land conservancy is to progress in this country.

Further, the ability to establish and hold in perpetuity a conservation covenant or servitude in Canada is one of the institutional arrangements that needs continuing review and reform if private land conservancy is to progress in this country.

Since 1990, a number of publications have highlighted different aspects related to law reform, particularly those regarding conservation covenants and servitudes in Canada. These include: *Land, Law and Wildlife Conservation: The Role and Use of Conservation Easements and Covenants in Canada* (Trombetti and Cox 1990); *Using Conservation Covenants to Preserve Private Land in British Columbia* (Loukidelis 1992); *Conservation Covenants, Easements and Gifts* (Denhez 1993); *Private Conservancy: The Path to Law Reform* (Kwasniak (Ed.) 1994); *Here Today, Here Tomorrow: Legal Tools for the Voluntary Protection of Private Land in British Columbia* (Findlay and Hillyer 1994); and *New Game in Town: Conservation Easements and Estate Planning* (Lieberman 1995).

This document attempts to look at the legal development and current state of the art regarding covenants, easements and servitudes across Canada. It is the authors' hope that continuing education on this topic and call for reform will lead to new or revised legislation and complementary changes in related tax, assessment, planning and other laws that can enhance and promote the use of conservation covenants and servitudes as a major tool in the conservation of land across Canada.

SECTION I

CONSERVATION COVENANTS AND EASEMENTS

Definition

Conservation covenants or easements (for the purposes of this report, the two terms can be used interchangeably) are a statutory adaptation of two familiar legal tools, the restrictive covenant and the easement. A conservation covenant is a written agreement negotiated between a qualified holder with a landowner, under which the owner agrees to protect his/her land or specified aspects of it. The conservation covenant is registered on title to the land and thus binds successor owners. These agreements are entered into voluntarily and are established by negotiation with willing landowners.

Problems with Current Alternatives

Currently, there are two main habitat protection mechanisms being used by the private sector to protect natural areas on private lands; outright acquisition and short-term (usually five to 10 years) leases. Both approaches have significant disadvantages. Outright acquisition is expensive: it may remove land from local tax rolls when government is the buyer, and, in some cases, leads to hard feelings in the community because of a perception that conservation organizations and/or governments are competing with producers for agricultural or other rural lands. Fixed-term leases have the significant disadvantage of being relatively short-term, and lasting only as long as the original landowner retains title to the land involved. Further, total lease payments may approach the investment which would have been required to purchase the site. However, fixed-term leases are beneficial in that they can enable temporary protection of sensitive areas while a more permanent solution (i.e., fee simple acquisition or perpetual easement) is worked out.

Profit à prendre is another common law interest whereby an organization, or an individual, is given the right to enter onto another's land and carry away or harvest a specified part or produce of the land (e.g., trees or minerals). For example, if a landowner wanted to preserve a woodlot on the land, he/she could grant a conservation organization a *profit à prendre* entitling the organization to cut trees. This would prevent future landowners from harvesting the trees because the right to do so had been given away. The non-exercise of a profit may be of conservation value, but has limited application and is untested and poorly designed for conservation purposes.

One further example from Prairie Canada is included in the Prairie Farm Rehabilitation Administration's (PFRA) Permanent Cover Program. Through this program, the PFRA has ensured that agreements to convert marginal crop land to permanant cover under the Permanent Cover Program are binding for a full 10 or 21 year term by including an option to purchase provision in the case of breach of agreement. This option to purchase gives a recognizable interest in land which is protected by way of caveat; any potential successor would be bound by the terms of the agreement. Although this provision provides a non-statutory method of ensuring long-term conservation, it greatly complicates negotiations with willing landowners who are concerned about losing their lands for breach of the agreement, and is used only as a last resort.

It is therefore apparent that both governmental and non-governmental agencies in many provinces in Canada lack the ability to ensure protection of specific values on private lands in perpetuity. The solution to this problem in other jurisdictions has been the creation by legislation of a statutory conservation covenant, easement or servitude.

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Benefits of Conservation Covenants

Conservation covenants provide many benefits for habitat protection initiatives.

Conservation covenants:

- facilitate the protection of valuable habitat and other land based features on private land without the full expense of land acquisition. Any payment required for a covenant may be considerably less expensive than that required for outright (fee simple) acquisition;

- allow for the protection of smaller parcels of land than outright acquisition would protect without necessarily removing the entire parcel of land from productive uses. For example, a covenant could involve all of a landowner's property, or could be limited in geographic application to specific habitat areas adjacent to agricultural land while still allowing the land to be farmed;

- provide permanent protection of habitat on parcels that are not for sale;

- potentially provide income tax benefits for landowners who wish to donate a conservation covenant;
- allow land to remain within the local government's property tax base (although the covenant portion may receive special tax relief concessions in some jurisdictions);
- allow land to continue to be managed by the private landowner, thus the landowner continues to play an active role in land stewardship;
- provide flexibility; each covenant could be negotiated to suit the particular needs of the conservation agency and the landowner, and the features on the land; and
- provide a mechanism for dispute resolution between, for example, family members or other parties with diverse interests.

EXISTING LAW OF EASEMENTS AND COVENANTS

There are two types of easements and covenants: those based on the common law and those based on statute. Common law is the body of law evolved through decisions taken by courts over the years; statutes are enacted by legislatures. An overview of the common law requirements of both easements and covenants is necessary to understand the extent to which these requirements reduce the efficiency and adaptability of such agreements in preserving natural areas and why statutory reform in this area is necessary (for a detailed discussion, refer to Trombetti and Cox (1990); Loukidelis (1992)).

Common Law Easements

An easement generally gives the holder, the owner of one parcel of land, a right to use the land of another for a specific purpose. Easements become tied to the land title and bind successive owners to the terms of the agreement. The common law requirements for an easement are:

- there must be a *dominant* and *servient* tenement. The dominant tenement is the parcel of land that benefits from the easement; the servient tenement is the parcel of land that is subject to the easement;
- the easement must benefit the dominant tenement in the sense of making it a better or more convenient property;

- the dominant and servient tenements must be separate parcels of land not owned or occupied by the same person; and

- a right over land must be specific enough to be capable of forming the subject matter of a grant.

Although easements can simply be a right-of-way whereby the owner of the servient tenement agrees not to interfere with passage, generally they are *positive* in character. That is, an easement permits the owner of the dominant tenement to enter onto the servient tenement to do something.

Restrictive Covenants

A common law restrictive covenant is an agreement between two landowners, one of whom promises not to use his/her land for certain purposes in order to benefit the land of the other. As with easements, there are the same requirements for a dominant and servient tenement, and the covenant becomes tied to the land title and binds subsequent landowners. In contrast to easements, however, restrictive covenants must be *negative* in character; that is, restrictive covenants prohibit the owner of the servient tenement from doing something on or with his/her land, in order to benefit the dominant tenement. Although common law covenants may also be positive in nature (i.e., require the servient landowner to do something, often determined through a requirement to spend money), judges have decided that positive covenants are not capable of running with the land and thus do not bind subsequent landowners.

Although common law easements and restrictive covenants satisfy some of the objectives of private conservancy, defined as the conservation of private lands, there are several stumbling blocks to their effective use as conservation tools.

Although common law easements and restrictive covenants satisfy some of the objectives of private conservancy, defined as the conservation of private lands, there are several stumbling blocks to their effective use as conservation tools:

- the requirements of the dominant and servient tenement are rarely met: conservation agencies rarely own adjacent land that could be said to benefit from habitat retention.

- only the owner of a dominant tenement has the right to enforce the provisions contained in the easement or restrictive covenant;

- the benefits are not assignable to another party;

- because restrictive covenants and easements have not traditionally been used for conservation purposes, there is no assurance that such agreements would hold up under legal challenge.

These shortcomings have severely limited the use of common law easements and covenants in achieving the objectives of private conservancy in Canada. Application of these instruments therefore depends on statutory reform of these common law requirements. The major differences between conservation covenants and common law easements and restrictive covenants are, first, that the conservation covenant does not need to benefit another nearby parcel of land and, second, it can include both positive and negative obligations of the landowner.

SECTION II

THE STATE OF CONSERVATION COVENANT AND EASEMENT LEGISLATION IN CANADA

However, many of these laws have limitations in their application for preserving natural areas as they are targeted to heritage or historic sites and only enable government agencies to hold such agreements.

Most provinces and territories have made some provisions for statutory covenants or easements under provincial legislation. However, many of these laws have limitations in their application for preserving natural areas as they are targeted to heritage or historic sites and only enable government agencies to hold such agreements. Nevertheless, some are applicable to open landscape values, whether for natural, agricultural or scenic purposes, and recent proposals for legislative change have been aimed at the use of conservation covenants in preserving natural sites. The following is an overview of the state of conservation covenant or easement legislation across Canada.

British Columbia

Section 215(1.1)(e) of the Land Title Act permits a covenant to be registered for the purpose of protecting, preserving, conserving, or keeping land in its natural state according to the terms of the covenant.

The primary statutory tool in place in British Columbia to enable conservation covenants is the *Land Title Act*,[1] which was recently amended by Bill 28. Bill 28 amended section 215 of the *Land Title Act* to enable Crown and municipal governments and agencies, and non-governmental organizations to enter into conservation covenants with property owners, and provides a mechanism to have a notation of these covenants entered on the title of the affected property. Conservation covenants under section 215 (1.3) may include provisions that "land or a specified amenity of the land be protected, preserved, conserved...in accordance with the covenant and to the extent provided in the covenant". "Amenity" includes any "natural, historical, heritage, cultural, scientific, architectural, environmental, wildlife or plant life value relating to the land that is subject to the covenant". Section 215(1.1)(e) of the *Land Title Act* permits a covenant to be registered for the purpose of protecting, preserving, conserving, or keeping land in its natural state according to the terms of the covenant. It is enforceable against successors in title and does not have to benefit adjacent land. However, prior to Bill 28, section 215

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1 R.S.B.C. 1979, c.219, s.215

of the *Land Title Act* only permitted a landowner to enter into an agreement with government - private conservation organizations could not acquire covenants under the Act.

Administration of the amendments is divided into two streams: general and specific designations. Registered non-profit organizations or societies can apply for general designation or assignment, meaning that they can enter conservation covenants anywhere within the province without having each one reviewed by the government. Other organizations or individuals can apply for a specific designation for a particular site and covenant. In either case, the application for designation to the Surveyor General must include information on the applicant (such as incorporation date and number, and whether it is non-profit), its activities and how these relate to conservation covenants, reasons for the application, type of covenants and a legal description of where they are to be held, and whether the land subject to the covenant lies within an agricultural land reserve (ALC). If the covenant affects land within an ALC, then there is a special application procedure involving the consent of the Agricultural Land Commission, or on appeal, the Minister of Agriculture, Fisheries and Food and the Minister of Environment, Land and Parks together. To register a covenant at the Land Titles Office, a statement of designation plus the covenant document are all that is required.

Bill 28 received first reading in the House on May 6, 1994 and came into force in August 1994. The main issue in passing the Bill came from the agricultural community, who were concerned about crop damage by waterfowl when wetlands were preserved on agricultural lands. To alleviate this concern, a deal was struck whereby any conservation covenant on agricultural land would have to be approved by the Minister of Agriculture. Bill 28 (s.4) repealed the conservation covenant powers in sections 13 and 27 of the *Heritage Conservation Act*,[2] effectively consolidating and continuing these provisions in the *Land Title Act*. The Bill also made consequential amendments for conservation covenants to the *Assessment Act* [3] and the *Property Transfer Tax Act*. [4]

Alberta

Although Alberta has a number of statutes in place that allow government to enter into agreements with private landowners to preserve land, most do not allow other organizations to hold agreements and contain other restrictions that limit their utility as private land conservation tools.

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2 R.S.B.C. 1979, c.165
3 R.S.B.C. 1979, c.21
4 S.B.C. 1987, c.15

The *Land Titles Act* [5] contains sections specifically recognizing restrictive covenants and easements, and allows them to be registered on title under section 52. However, they do not run with the land unless they fulfill the common law requirements to do so. It retains the requirement for a dominant and servient tenement, although the stipulation that these be owned by different persons is removed. In general, however, because the *Land Titles Act* retains most of the common law stumbling blocks, it does very little to facilitate private land conservation.

The *Historical Resources Act,* [6] although geared primarily towards the protection of historic, archaeological and palaeontological sites, in theory could be used to protect valuable natural areas. The Act broadly defines "historic resource" in section 1(f) as,

> "any work of nature or of man that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific, or aesthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object."

Section 25 enables an owner to enter into an agreement, registrable at the Land Titles office, with the Minister of Culture and Multiculturalism, the Council of the Municipality in which the land is located, the Alberta Historical Resources Foundation, or an historical organization approved by the Minister. Although the *Historical Resources Act* removes most of the common law restrictions to make it easier for certain public and private organizations to protect historic resources in perpetuity, it is unlikely to be a useful tool in private land conservation. First, although legally the Act could apply to natural areas, its focus and emphasis, and thus implementation, is on historic, archaeological and palaeontological resources; second, the list of persons or organizations able to enter into agreements with private landowners is quite limited and has a specific "historic" orientation; and third, the Minister, whether party to the covenant or not, may discharge or modify any agreement if he/she feels it is in the public interest.

Section 22 of the *Environmental Protection and Enhancement Act* [7] (EPEA) enables the Minister of Environmental Protection to enter into an agreement with the registered owner of the land to restrict the purposes for which that land may be used, in order to protect and enhance the environment. Problems associated with the provisions set out in the EPEA include the fact that it does not allow other agencies or private conservation organizations to enter into agreements with private landowners; it only authorizes restrictions on the land and not positive obligations; it assumes that conservation agreements will terminate or

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5 R.S.A. 1980, c.L-5

6 R.S.A. 1980, c.H-8, s.25

7 S.A. 1992, c.E-13.3

expire unless perpetuity is specifically stipulated; it does not indicate who may enforce or discharge an agreement; and it does not mention whether any benefits can be assigned (for further detail, refer to Kwasniak (1994)).

In November 1993, Bill 211, the "Conservation Easement Act", a Private Member's Bill, received first and second reading in the Alberta Legislature. If passed, the Bill would allow,

> "the Minister, a Government agency which administers a private conservancy program, the Council of the municipality in which the land is located, a society registered under the *Alberta Society's Act*, organized for private conservancy purposes, or any other person or organization which is approved by the Minister to enter into a conservation easement agreement with an owner of land relating to the preservation of any land or water including open spaces."

The Bill also detailed procedures for registration, enforcement, assignment, modification, public access, and occupier's liability. It was, however, voted down. According to the Alberta Hansard, major criticism surrounding the Bill included that,

- there had not been enough consultation with the public, interest groups, etc.
- conservation easement legislation should be introduced as an amendment to existing legislation (likely s.22 of the EPEA) rather than as separate legislation.
- it was uncertain how covenants would affect the local tax base.

Further concerns were raised regarding:

- how registration of a covenant would affect oil and gas producers' access to mineral rights they had purchased.
- the lack of involvement by other government departments in drafting the legislation (particularly Municipal Affairs).

Recently, the Minister of Environmental Protection set up a task force within that department to examine the idea of conservation covenants. The task force will discuss issues such as who can hold covenants, who can grant them, and enforcement, and intends to prepare a draft position for the Department's Executive in 1995. Unfortunately, this initiative has been slowed by the involvement of Department staff in the development of other legislation of higher priority.

Saskatchewan

The relevant legislation in Saskatchewan, the *Heritage Property Act,*[8] is aimed at preserving heritage property and denotes it in section 2(I) as,

> "any property, whether a work of nature or of man that is of interest for its architectural, historical, cultural, environmental, aesthetic or scientific value, and includes a site where architectural, historical, cultural, or scientific property is or may reasonably be expected to be found."

Easements or covenants can be entered into by the Minister responsible for the administration of the Act (currently the Minister of Municipal Government), the municipality within which the property is situated, and by a heritage organization approved by the Minister. The easement or covenant must be accompanied by a certificate of purpose in order for the Minister to register the agreement with the land title office. Covenants are assignable amongst qualified holders. However, covenants have not been used under this legislation to preserve heritage property (either built or natural).

The approach taken to heritage property preservation has primarily involved the designation of the site as either a municipal heritage property (designation by the municipality in which the property is situated) or a provincial heritage property. To date, over 600 properties have been municipally designated as heritage sites. Over 90% of these have been for "built" heritage and approximately nine percent have been for archaeological sites. Less than one percent of designations has been for natural heritage preservation. Although designations are binding in perpetuity, provisions do exist that allow the designation to be withdrawn under certain circumstances.

Recently, several conservation organizations have expressed their interest in legislative changes that would allow wider use of conservation covenants for natural area preservation. The provincial government recognized this need and the Department of Environment and Resource Management established a working group to develop a conservation covenant position statement for public consultation. A position paper was drafted in March 1995, and, if adopted, the department intends to introduce legislation as a stand-alone bill, possibly early in 1996.

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[8] S.S. 1979-80, c.H-2.2, s.59

Manitoba

The 1985 *Heritage Resources Act* [9] is aimed at protecting heritage resources. According to Section 1, heritage resource is defined to include,

> "any work or assembly of works of nature or of human endeavor that is of value for its archaeological, palaeontological, pre-historic, historic, cultural, natural, scientific or aesthetic features, and may be in the form of sites or objects or a combination thereof."

The key words with respect to natural area conservation are "works of nature" valuable for "natural", "scientific", or "aesthetic features". Covenants are intended to provide for the maintenance, preservation, or protection of a heritage site by its owner and successors in title. Section 21 of the legislation permits the Minister assigned to the administration of the Act, municipalities, as well as interested persons, groups, societies, organizations, and agencies to enter into heritage conservation covenants with private landowners. It also contains provisions for modification and discharge of the agreement, although the Minister may modify an agreement unilaterally even if not a party to it. The Act does not provide, however, that these heritage agreements are assignable.

The Minister, whether or not a party to the heritage agreement, must file a notice of the heritage agreement in the land titles office where the affected land is located. This step, however, has created confusion and a reluctance within the Manitoba government to carry out this function. Apparently, one organization has inquired of Manitoba whether the government would complete its role in the registration process. The government responded that it was unsure of how to register these interests and would have to do detailed legal research before it might be able to complete the registration process.

The government's commitment was reinforced in the recent Speech from the Throne, read on December 1, 1994, which contained a reference that it intends to bring forward legislation to allow for the broad use of conservation covenants for private land preservation.

The *Crown Lands Act* [10] was amended by Bill 17 in 1993. This amendment added section 13.1, which states that "where an agreement entered into between the Crown and a person for the disposition of Crown lands contains a restriction on the development of all or part of the lands for the purpose of any the protection of any natural resource...the agreement shall be enforceable against the subsequent owner". A party to the agreement may file a caveat with a copy of the agreement attached in the proper land titles office.

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9 C.C.S.M. c.H39.1

10 C.C.S.M. c.C340

Although the *Heritage Resources Act* potentially provides a good avenue for establishing conservation covenants for environmental purposes, it has been limited in use to protecting cultural properties. However, numerous private organizations have been examining the need for new legislation and the government is pursuing the subject further through an interdepartmental working group, whose mandate is to evaluate the feasibility and alternative ways of introducing conservation covenant legislation. The government's commitment was reinforced in the Speech from the Throne, read on December 1, 1994, which contained a reference that it intends to bring forward legislation to allow for the broad use of conservation covenants for private land preservation.

Ontario

The *Conservation Land Act*[11] was amended by Section 128(2) of Bill 175, the *Statute Law Amendment Act*,[12] which received Royal Assent on December 8, 1994. Coming into force on January 31, 1995, these amendments allow an owner of land to grant an easement to, or enter into a covenant with, a conservation body, "for the conservation, maintenance, restoration or enhancement of all or a portion of the land or wildlife on the land or for access to the land for these purposes". "Conservation body" is broadly defined to include,

- the Federal and Provincial Government and associated agencies;
- a band as defined in the *Indian Act*;
- the council of a municipality;
- a conservation authority;
- a non-profit corporation incorporated under the federal or provincial corporations statutes that is a charity registered under the *Income Tax Act*;
- a trustee of a charitable foundation that is a charity registered under the *Income Tax Act*.

The amendments also include provisions for assignment of covenants to another conservation body or automatically to the Minister if the conservation body holding the covenant or easement loses its status as a qualified conservation body. The amendment also deals with registration, enforcement and interpretation issues. While subsection 11 enables a regulation to be passed requiring the keeping, inspection or submission of records, information or returns, the government does not deem it necessary to pass such a regulation at this time.

Due to limited consultation on its exact wording and its unorthodox route to enactment, there are likely to be improvements to the provisions that will be considered in the future, possibly as complementary amendments to new heritage legislation. The improvements might include: another category of conservation body which would allow other appropriate

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11 R.S.O. 1990, c.C.28, s.3

12 S.O. 1994, c.27

groups to be recognized as such by the Minister of Natural Resources; enabling a conservation body to designate a backup organization, rather than automatic assignment to the Minister; clarification of whether the current wording applies to recreational or educational purposes, as is questioned by a number of observers; more explicit directions on procedural items, such as modification and discharge and the specific relationship to the land registration statutes; and taxation questions, as originally identified in Bill 92.

Heritage easements have been available since 1975 under sections 10 and 22 of the Act whereby agreements for broad heritage purposes could be entered, or assigned, by the Ontario Heritage Foundation or the Minister of Culture, Tourism and Recreation.

Prior to these amendments, the primary piece of legislation pertaining to conservation easements and covenants was the *Ontario Heritage Act*.[13] Heritage easements have been available since 1975 under sections 10 and 22 of the Act whereby agreements for broad heritage purposes could be entered, or assigned, by the Ontario Heritage Foundation or the Minister of Culture, Tourism and Recreation. Under section 37, municipalities can enter into easement agreements for the conservation of buildings of historic or architectural interest; however, they do not have legislative authority to acquire natural heritage or open space easements. Although the statute contains no actual definition of the property affected by it, section 7 outlines the objectives of the Foundation which include the "preservation, maintenance, reconstruction, restoration, and management of property having historical, architectural, archaeological, recreational, aesthetic and scenic importance". Properties of natural significance could fall within one of the latter three areas specified by the legislation, and, to date, over 140 easements preserving the built heritage and 12 natural heritage agreements have been obtained by the Ontario Heritage Foundation. Natural heritage conservation easements have protected sites ranging in size from five acres to 650 acres in areas such as the Niagara Escarpment, Carolinian Canada sites, and Pelee Island. The legislation contains a provision that allows the Foundation to acquire an easement and then assign it to another conservation organization. Although this has not yet been done, the Foundation is currently negotiating such an arrangement. One easement, however, is held by the Foundation but monitored by the Canadian Parks Service. The legislation does not, however, permit a private conservation organization to acquire conservation easements, except by assignment from the Foundation.

Attempts are being made to amend the *Ontario Heritage Act* in order to allow conservation covenants to be held by government agencies and non-profit organizations for the purposes of cultural and natural heritage preservation. These changes would be introduced as a public bill by the Minister of Culture, Tourism and Recreation. Current proposals appear to be very similar to the new provisions in the *Conservation Land Act*, but specifically

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13 R.S.O. 1980, c.O.18, ss. 10 and 22

include recreational and scenic purposes, which are not included in the latter. In 1993, Bill 92, "An Act Respecting Land Conservancy Corporations," was introduced into the Ontario Legislature as a Private Member's Bill. The Bill would have authorized the granting "of easements to land conservancy corporations for the preservation, protection, conservation, maintenance, restoration, or improvement of significant lands in Ontario". Significant lands are defined as those which have "natural, scenic, agricultural, or silvicultural value, including farmlands, woodlands, wetlands, and wildlife habitats" or those designated as such by the Lieutenant Governor in Council. Organizations would have had to be designated as land conservancy corporations to qualify to hold these interests. Significant consequential amendments to other Acts were proposed as well. Bill 92 received second reading on October 7, 1994, but was withdrawn on November 3, 1994.

In addition to the *Conservation Land Act* and the *Ontario Heritage Act*, a third type of statutory covenant or easement is the "agricultural easement". Section 5 of the same Bill 175 created this authority through amendments to sections 3, 4, 4.1 and 9 of the *Agricultural Research Institute of Ontario Act.*[14] Similar to the Ontario Heritage Foundation, the Agricultural Research Institute of Ontario (ARIO) may enter into and register agreements "for the conservation, protection or preservation of agricultural lands".

The Ministry of Agriculture, Food and Rural Affairs had established a $20 million fund to purchase these agricultural easements in the regulation-defined "agricultural lands" of the Niagara tender fruitlands area. However, this program was cancelled by Ontario's Progressive Conservative government, shortly after taking office in June 1995. Although the program was cancelled, the legislation remains in place and may be utilized in the future. It is therefore interesting to note that the accompanying amendments also exempt agricultural easements from the provisions of the *Conveyancing and Law of Property Act* [15] and the *Land Titles Act.*[16] These Acts allow a court to modify or discharge a covenant or easement upon application by a landowner, without the agreement of the holder of the interest. This exemption is not made for the *Conservation Land Act* nor the *Ontario Heritage Act*, and thus begs the question whether such court procedures do apply to these latter statutes, despite some suggestions that they do not. The resolution of this difference in legislative drafting will emerge over time, but again highlights variations among the various programs in Ontario.

A fourth type of interest in Ontario is a loose collection of other statutes which allow agreements to be registered on title for conservation purposes. These statutes tend to be quite focused in their purpose, lack detail concerning procedure or application, and only

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14 R.S.O. 1990, c.A.13
15 R.S.O. 1990, c.C.34, s.61(4)
16 R.S.O. 1990, c.L-5, s.119(11)

allow the provincial or municipal government to register these agreements. While this report will not elaborate these to any extent, the following are some of the relevant statutes:

- *Forestry Act*[17] (wood production, wildlife habitat, flood and erosion protection, recreation, and water supplies);
- *Game and Fish Act*[18](wildlife management and habitat);
- *Ministry of Government Services Act*,[19] and statutes referencing this Act ("public works"- all government property);
- *Municipal Act* [20] ("public utility" - water works or supply);
- *Ontario Water Resources Act* [21] (water or sewage works);
- *Planning Act* [22] (site plan and subdivision control agreements);
- *Public Lands Act* [23] ("public works", as in the *MGS Act*, above).

Along with common law covenants and easements, these provisions allow certain agreements to be registered on title and may be useful in some circumstances. These should not be overlooked when the authority found under the first three types of registrable conservation agreements is too limited for the contemplated purposes.

Quebec

In Quebec, easements are called "servitudes" and arise from Quebec civil law. As in the common law, a basic requirement for a valid servitude requires that there be dominant and servient land, and that these lands must be owned by different persons. Once validly created, the servitude will run with the land and bind subsequent owners. As is the case with covenants under the common law, servitudes have little utility in preserving natural areas as very rarely do such areas meet the necessary requirements (particularly the necessity for a dominant and servient tenement). This is the situation even for the particular case of the conservation of heritage buildings under Quebec's heritage legislation. While historically and under property and heritage legislation partial land interests require adjacent lands, the new *Civil Code*, article 1119 refers to "usufruct, use,

New legislation, however, is being drafted in Quebec which will remove the need for a dominant tenement and allow for protection of land in perpetuity.

17 R.S.O. 1990, c.F.26, ss.2-3
18 R.S.O. 1990, c.G.1, s.6
19 R.S.O. 1990, c.M.25, s.10
20 R.S.O. 1990, c.M.45, s.194
21 R.S.O. 1990, c.O.40, s.27
22 R.S.O. 1990, c.P.13 ss. 41(10 and 51(26)
23 R.S.O. 1990, c.P.43, s.46

servitude and emphyteusis" as "dismemberments of the right of ownership". The wording might be argued to infer that these are not the only "dismemberships" of ownership, and that servitudes without adjacent lands could also arise; however, this is highly speculative.

New legislation, however, is being drafted in Quebec which will remove the need for a dominant tenement and allow for protection of land in perpetuity. The legislation is currently in final draft form and was adapted from the United States' *Uniform Conservation Easement Act*.[24] It states that an ecological servitude can be held by a registered non-profit organization, a regional or local municipality, or a public purpose trust in order (1) to protect, preserve, conserve, highlight, restore, rehabilitate, or add to the environment or the particular character of a tenement, or (2) to permit or maintain agricultural, forestry, recreational, scientific, or educational uses compatible with (1). The legislation also addresses issues of duration, modification, and termination. Once finalized, it will be submitted to the Ministry of the Environment for introduction as a government bill and, if passed, a model servitude will be set up and placed in the legislation as an addendum. There has been considerable support for the introduction of this bill from both government and conservation organizations. Throughout the drafting process, most major Quebec conservation organizations were consulted, and many positive responses were received.

There has been considerable support for the introduction of this bill from both government and conservation organizations.

New Brunswick

The *Historic Sites Protection Act* [25] permits easements or covenants to be entered into regarding the preservation of an historic site, which is defined in section 1 as, "any site, parcel of land, building, or structure of historical significance that has been designated as such by the Minister". Potential holders under this statute are the Minister (member of Executive Council in charge of Historical Resources Administration), and any other person who has had any easement or covenant agreement approved in writing by the Minister. Under section 2.1 of the legislation, an easement or covenant can be registered on title and thus bind subsequent owners. These agreements can then be assigned to any person, without requiring the approval of the Minister, and the assignee has the ability to enforce them. The specific stipulation requiring the site to have historic significance greatly limits the utility of the Act in preserving natural areas and, to date, the Act has only been applied to historic building preservation. Natural areas, generally not of *historic* significance, are not covered under the Act and once again the common law conditions would govern acquisition of these. Recently, an internal working paper was developed and taken to

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24 12 U.L.A. 55 [Supp. 1985]

25 R.S.N.B. 1973, c.H-6

senior levels of government, but then stalled. The fish and wildlife division is currently revisiting a range of wildlife policies and acts and it will probably be about two years before conservation easement legislation is brought forward, likely as part of a comprehensive package of reforms.

Nova Scotia

Bill 211, *An Act Respecting Conservation Easements*, was passed on June 30, 1992. Also known as the *Conservation Easements Act,* [26] it allows the Minister or a designated conservation organization to enter into an easement or covenant with the owner of a natural area to preserve that area for a stated period of time or in perpetuity. The Cabinet must first designate the land as a natural area pursuant to the Act. A broad definition, however, is adopted and land may be designated as a natural area if it:

- contains natural ecosystems or constitutes the habitat of rare, threatened or endangered plant or animal species;
- contains outstanding botanical, zoological, geological, morphological or palaeontological features;
- exhibits exceptional and diversified scenery;
- provides a haven for concentrations of birds and animals;
- provides opportunities for scientific or educational programs in aspects of the natural environment;
- is representative of the ecosystems, landforms or landscapes of the Province.

In order to use the legislation, a conservation organization must be designated as such by Cabinet for the purposes of the Act. To achieve such a designation, an organization must meet criteria prescribed in the Regulation #93-488, which may involve modifying the organization's by-laws, and the designation must then be approved by the solicitor for the Nova Scotia Department of Natural Resources. Cabinet approval is also required when government acquires or assigns an easement. Although the substantial Cabinet involvement in the designation of sites, organizations, and ministerial assignments places a large administrative burden on government, the process has apparently been able to move along quickly in this small province. A number of organizations have recently been designated under the Act, and the government registered its first agreement on November 25, 1994. This indicates that there is interest in this new legislation, which hopefully will lead to its wider use as an important land preservation tool.

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[26] S.N.S. 1992, c.2

Nova Scotia's *Heritage Property Act* [27] is aimed at protecting buildings, streetscapes, and areas of historic, architectural, or cultural value. Section 20 allows an agreement to be entered and then deposited in the register of deeds that grants "a right or incurs an obligation respecting the use, preservation or protection" of heritage property. The agreement entered by a landowner is either with the Minister concerning provincial heritage property, or with the council of a municipality for municipal heritage property. The agreement is characterized as an encumbrance, rather than other provinces' references or comparisons to easements or covenants, and its rights or obligations may be waived or discharged by the [provincial] Governor in Council or the municipality, as the case may be. A natural area would likely have to contain one of these features in order to qualify for, or benefit from, protection under this legislation. Because natural areas of any size would rarely correspond with the categories qualifying under the Act, these provisions are of little utility for the purposes of private land conservation.

Prince Edward Island

Prince Edward Island's *Natural Areas Protection Act* [28] provides for the designation of Crown and private land as natural areas (broad criteria for such a designation are provided) and allows for the protection of private lands through the use of "restrictive" covenants. Such covenants may be positive or negative, run with the land and thus bind successive owners of the property, and are enforceable by means of injunction. Covenants can be made in favour of the Minister of the Environment or "any person" including a conservation organization, but the benefit of the covenant cannot be assigned. The *Natural Areas Protection Act Regulations* (EC54/89) contain provisions to regulate sites designated as Natural Areas under other sections of the Act, but these do not have a direct bearing on the terms of a conservation covenant. However, the province may nonetheless attempt to duplicate, through the covenant's terms, the Regulation's section 3 prohibitions for sites intended to become Natural Areas.

The Act has been used by government to protect both Crown and private land through covenants registered against the deed. The Island Nature Trust essentially acts as a broker; it acquires the agreement and then transfers it to the provincial government, and does not retain the sites. To date, 1607 ha of wetland, 463 ha of riparian zone, and 62 ha of woodland, consisting of both core and buffer habitat, have been protected in this manner. There are currently about six private covenants on private land, with six more expected in the near future, and about 96 covenants on Crown lands. In each case, a management plan was prepared specifying which activities were permissible; regulations have tended to be strict for core areas and more lenient for buffer areas.

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27 R.S.N.S. 1989, c.199, ss. 3 and 20

28 R.S.P.E.I. 1988, c.N-2, s.5

A second statute of relevance in Prince Edward Island is the *Museum Act*.[29] This legislation authorizes only the "Museum" (defined as the Prince Edward Island Museum and Heritage Foundation) to enter into agreements in the form of covenants or easements with private landowners, and register these on title through section 11. The Museum's purpose is to study, collect, preserve, interpret, and protect the human and natural heritage of Prince Edward Island. The Act is very broad and can be applied to any person owning land on the Island; there are no attempts to qualify the type of land that will apply by suggesting particular features that must be present before a covenant or easement can be granted by a private landowner to the Museum. There is also a provision within the legislation for the Museum to assign these agreements to a corporate body having objectives similar to the Museum. The Act allows the Museum to cancel any such agreement under circumstances prescribed by by-law, with or without the consent of the landowners. Although the legislation is silent, such cancellation could even be made without the consent of or notice to any assignee which may subsequently be holding the agreement, and which may have purchased the agreement from the Museum or made investments in or commitments for the property.

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In 1992, the *Fish and Game Protection Act*[30] was amended by S.P.E.I. 1992, c.27 to allow the Minister to enter into an agreement with a private landowner to impose a covenant or easement on a specified area of land for the purpose of wildlife habitat protection. This agreement would run with the land either for an assigned period of time or in perpetuity, could be positive or negative, and would be "enforceable by either party to the agreement or any conservation agency to which benefit of the covenant or easement is assigned by the agreement". Presently, a draft form for conservation easements is being put forward to the Executive Council.

The *Heritage Places Protection Act* [31] enables organizations to be formed for the purposes of acquiring conservation easements or entering into restrictive covenants concerning "heritage places". Heritage places are defined as those which include works of nature or humans valued for their palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest.

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29 R.S.P.E.I. 1988, c.M-14, s.11

30 R.S.P.E.I. 1988, c.F-12, s. 32.1

31 R.S.P.E.I. 1992, c.31, s.10

Finally, *Land Identification Regulations* [32] under the *Planning Act* [33] established the land identification program which allows a covenant to be placed on a parcel of land for the purposes of preserving agricultural land for agricultural uses and preventing the development of land identified for non-development uses.

Newfoundland and Labrador

The *Historic Resources Act* [34] allows covenants or easements to be entered into for the protection of an historic resource. An historic resource is defined as,

> "any work of nature or of humans that is primarily of value for its archaeological, prehistoric, historic, cultural, natural, scientific or aesthetic interest, including an archaeological, prehistoric, historic, or natural site, structure or object."

There are potentially four bodies that can hold easements or covenants: the Minister of Culture, Recreation and Youth, the Heritage Foundation of Newfoundland and Labrador, a municipal authority in which the property is situated, and a heritage or historical organization approved by the Minister. Once an easement or covenant has been obtained by one of these bodies, it can be assigned amongst them. In the event that a heritage group approved by the Minister were to obtain or have assigned to it an easement or covenant, and subsequently dissolve, the agreement would be assigned by law to the Minister. Covenants under the *Historic Resources Act* have been used, in a limited capacity, to preserve the "built" heritage. None has been used for natural area preservation, although provisions exist in the legislation to do so.

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32 P.E.I. EC710/77

33 R.S.P.E.I. 1988, Cap. P-8

34 R.S.N. 1990, c.H-4, s.30

Yukon

The Yukon *Environment Act* [35] contains provisions specific to conservation agreements. Section 76 states that a conservation easement may impose restrictions or positive obligations for:

"(a) retaining or protecting natural, scenic, or open-space values;
(b) assuring natural resources are available for recreational or open-space uses;
(c) conserving or enhancing natural resources, the land in its natural state, wildlife habitat, plant habitat, or migratory routes of birds and animals; or
(d) conserving or enhancing soil, air or water quality."

Qualified holders of conservation easements under the Act include a governmental body empowered to hold an interest in real property, and a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include any of the purposes listed in section 76. Conservation easements run with the land and are assignable to other holders. The legislation also makes provisions for enforcement, validity and termination of agreements. Although the easement provisions in the Yukon legislation appear comprehensive, they have yet to be applied in any capacity, and could only affect a very small proportion of the territorial land base.

Northwest Territories

The Northwest Territories does not have any type of conservation easement legislation currently in place.

Federal Application

While property law is squarely within provincial jurisdiction in Canada, the federal government also has the constitutional and statutory ability to acquire lands and interests in land. Thus, while the federal government makes every attempt to abide by provincial rules concerning the types of interests and procedures for dealing with property, it is not strictly bound to do so. This principle, of course, also applies to conservation covenants, easements and servitudes.

Many federal statutes enable federal agencies to acquire lands or interests in lands for a multitude of purposes.[36] This legal mandate must then be coupled with the procedures in

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35 S.Y. 1991, C.5, ss.76-80

36 See, for example, the *National Parks Act*, R.S.C. 1985, c.N-14, s.6(4); the *Canada Wildlife Act*, R.S.C. 1985, c.W-9, s.9; and the *National Capital Act*, R.S.C. 1985, c.N- 4, s.10(2).

the *Federal Real Property Act* [37] and, by practice, the provincial rules for registering documents on title. "Real property" under the *Federal Real Property Act* includes a "lease, easement, servitude or any other estate, right, title or interest in or to the land, and includes the rights of a lessee therein".

While this Act recognizes easements, servitudes and other interests that arise from a common, civil or statutory law basis, such interests held without nearby lands for conservation purposes are new types of interests in land which have been created solely by provincial or territorial legislation. It could be argued, then, that there must be explicit authorization in this legislation for the federal government to be able to hold these new interests. An alternative interpretation could be that, once these interests are available to any organization, the *Federal Real Property Act* might authorize federal agencies to avail themselves of this type of interest.

Regardless of the interpretation, it is useful for conservation covenant, easement and servitude legislation to recognize that federal agencies are qualified to hold these interests in order that this important set of conservation actors clearly have these legal tools at hand. To date, the jurisdictions and Acts which explicitly enable the federal government and its agencies to enter into and register these agreements are:

- British Columbia's *Land Title Act*;
- Manitoba's *Heritage Resources Act*;
- Nova Scotia's *Conservation Easements Act*;[38]
- Ontario's *Conservation Land Act*;
- Prince Edward Island's *Natural Areas Protection Act*; and,
- Yukon's *Environment Act*.

Summary

As can be seen from the above discussion, the majority of easement legislation in place in Canada is in the form of "heritage" or "historic" resources acts. Although the legislation of most provinces includes provisions that would allow the Act to apply to the preservation of natural areas, these Acts have been aimed at preserving the "built" environment and, for the most part, have not been applied to natural areas. This may be because certain natural areas warranting protection, while of important wildlife habitat and aesthetic value,

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37 S.C. 1991, c.50

38 While the Act itself is sufficiently broad, the Regulations currently only relate to corporations and appear not to contemplate other provincial or any federal Crown agencies being designated as conservation organizations.

may not constitute "heritage resources" per se unless the land is considered to be of provincial significance. Thus they would not qualify as heritage resources under the Acts. Further, heritage resource Acts may be aimed at preserving a representation of a given natural area, rather than substantial amounts of one natural area type.

Currently, five jurisdictions (British Columbia, Ontario, Nova Scotia, Prince Edward Island, and the Yukon) have specific legislation in place allowing non-profit organizations as well as governments to negotiate conservation covenants or easements with private landowners. Governments have started to use these Acts for natural area preservation; however, because these Acts were proclaimed quite recently and are still relatively unknown, most have yet to be applied by conservation organizations to preserve private lands.

Currently, Quebec is in the process of introducing new legislation; Manitoba has made a formal commitment to introducing legislation; and other provinces are examining the issue of conservation covenants through interdepartmental working groups (Alberta, Saskatchewan).

It is hoped that this new interest will lead to legislative changes which will allow both government and private organizations to make wider use of conservation covenants to preserve natural areas on private lands.

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A complete summary of the state of Canada's conservation covenant or easement legislation is shown in Appendix 1.

CONSERVATION EASEMENT LEGISLATION IN THE UNITED STATES

The federal and various state governments in the United States have been using easements for scenic preservation and habitat preservation since at least the 1930s. Legislation in the United States has generally been aimed at promoting the benefits of conservation easements while eliminating the existing common law obstacles. Although private conservation objectives have been easier to attain in the United States than in Canada under existing common law, statutory reform has been necessary in the United States to allow meaningful use of conservation easements by private groups.

The Uniform Conservation Easement Act

In reaction to the traditional limitations of the common law and diverse state responses, in 1981, the National Conference of Commissioners on Uniform State Laws issued the *Uniform Conservation Easement Act* (12 U.L.A. 55 [Supp. 1985])(UCEA). Some states adopted the UCEA essentially as issued by the commissioners; others (i.e., California) have enacted their own legislation (see Appendix 2 for statutory citations by state). In drafting the legislation, the commissioners dealt with five aspects of the creation of valid conservation easements: definition, qualified holders, acceptance, duration and modification. The issue of enforcement was also dealt with in the UCEA.

Section 1(1) of the UCEA defines "conservation easement" as,

> "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property."

Qualified holders of easements include a governmental body empowered to hold an interest in real property under federal or state law, and a charitable corporation, charitable association, or charitable trust, the purposes or powers of which correspond with the purposes of a conservation easement described in section 1(1). Recognition of a "third-party right of enforcement" (section 1(3)) enables the parties to structure into the agreement a party that is not an easement holder but which has the right to enforce the terms of the easement. Such a party, however, must qualify as a holder under the Act. In addressing duration, the UCEA provides that a conservation easement is of unlimited duration unless the parties indicate otherwise. This has been an area of divergence among the states; some have used the same method as the UCEA (i.e., presuming perpetuity), others have failed to mention duration and, presumably, are governed by the applicable state law, and others still specifically do not presume perpetuity and require that the document must either state this or a specified shorter length. Nonetheless, the UCEA offers a straightforward and realistic approach by simply presuming perpetuity yet allowing the parties to designate otherwise.

With respect to enforcement, the UCEA stipulates four entities which may institute actions to enforce, modify, or terminate easements: an owner of burdened property, an easement holder, a holder of a third-party right of enforcement specified in the easement, and a person authorized by other law. The designation of several possible enforcers is an attempt to anticipate diverse situations which may occur, especially considering the potentially infinite duration of preservation easements.

Finally, the UCEA removes common law impediments to the use of easements in preserving natural lands. The traditional requirement that the holder own real property benefited by the agreement was specifically eliminated. The UCEA also provides that an easement may be affirmative or negative, and, regardless, allows for assignment of easements.

Although the UCEA provides a comprehensive framework from which to facilitate the preservation of private lands via the use of conservation easements, there are additional concerns not addressed in the UCEA (for more detail refer to Katz (1986)). These include:

- the question of whether third-party approval should be required to validate an agreement;
- other than the requirement of a recorded acceptance by the donee, no additional provisions exist regarding recording of an easement;
- the interplay and potential conflict with other existing legislation;
- consideration of local, state or federal tax policy;
- the provision for a right of entry of inspection; and
- provisions to preserve easements held by an organization which no longer is able to carry out the intentions of the private agreement.

Success of the U.S. Conservation Easement Program

The conservation easement program in the United States has been extremely successful. According to a 1985 survey carried out by the Land Trust Alliance, a total of 499 government and non-government organizations hold conservation easements, covering natural areas in all but four states. By 1994, the number of local or regional land trusts alone had grown to 1,100 and these groups had helped protect over four million acres of land, of which 737,000 is under a permanant conservation easement. Further, conservation easements protect more than 1.7 million acres of land in the United States, with the U.S. Fish and Wildlife Service holding more than 21,000 easements covering 1.2 million acres of prairie wetlands (Reid 1987).

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A number of authors familiar with the American experience have commented on factors related to its success. These factors include (refer to Reid (1987) for more detail):

- enthusiastic agency support;
- clear landowner understanding;
- use of easements as part of a range of land preservation techniques;
- understanding of reasons for lack of local support;
- having a variety of agencies able to hold easements;
- the use of "catalyst" groups to bring landowners and agencies together;
- an understanding of donor characteristics;
- regular monitoring of easements; and
- an understanding of problem areas hindering the use of easements.

SECTION III

ISSUES IN DRAFTING CONSERVATION EASEMENT LEGISLATION

The following discussion addresses a range of issues that should be considered when preparing conservation covenant legislation. For a more detailed overview, refer to Loukidelis (1992) and Attridge (1994).

Permissible Purposes

The legislation must clearly state the purposes for which covenants may be granted. These may be for; general environmental protection, habitat conservation, recreation, aesthetic and scenic values, existing land uses such as agriculture, and/or the more traditional historical, architectural or other cultural aspects of property. A clear description of purposes can be found in the Yukon, British Columbia and United States Acts.

Covenant Grantors

Besides private landowners, senior and municipal government agencies likely should be able to grant covenants. The granting of covenants by public bodies may be useful in some transactions, such as transfers of parks or public lands from government to another agency or private organization. Further, landowners should be allowed to grant more than one covenant, perhaps to different parties for different purposes.

Covenant Holders

There are two legislative approaches defining who may hold conservation covenants:

- criteria are set out in the legislation and all entities meeting these criteria can automatically hold covenants (e.g., Yukon, Manitoba, Prince Edward Island).
- government can be given the discretion to designate eligible organizations, sometimes subject to criteria (e.g., Saskatchewan, Nova Scotia, Newfoundland).

The first approach is preferable in that it allows organizations to plan how they can meet criteria and proceed without having to wait for government to act. In either case, criteria in the legislation must deal with:

- what kinds of organizational forms should holders have? Are they just incorporated groups, or also individuals, formal trusts, and other legal entities?
- what scope of government ministries, departments and agencies, and which levels, should be able to hold covenants?
- should charitable or public purpose criterion be included?

- should the organization have certain conservation purposes specified in its letters patent, articles of incorporation, or by-laws?
- are there other requirements necessary to ensure that holders do not abuse this capability?

However, land conservation initiatives are often grassroots/local efforts. Restricting qualified holders to larger, and therefore often national, organizations and agencies risks losing valuable local knowledge. It may also discourage participation of local volunteers.

Questions arise when deciding what types of private organizations should be able to hold covenants. Legislation may want to limit qualified holders to certain quasi-governmental entities or to well-established conservation organizations. This limitation is intended to ensure that only organizations with a genuine commitment to land conservation and the expertise and resources necessary to carry through with that commitment hold conservation covenants. It also lessens the likelihood that fraudulent transactions will be affected through organizations set up for that purpose alone. However, land conservation initiatives are often grassroots/local efforts. Restricting qualified holders to larger, and therefore often national, organizations and agencies risk losing valuable local knowledge. It may also discourage participation of local volunteers, whose services will often be necessary to monitor and enforce a conservation covenant properly. Existing legislation has usually stipulated that the private organization be a charitable corporation, charitable association, or charitable trust (e.g., Yukon, United States) or a society registered under the jurisdiction's Society Act (e.g., Alberta's Bill 211).

Covenant Registration

There is a need to specify how covenants are to be registered on title to bind current and subsequent owners. Some of these questions may already be answered in legislation governing traditional easements and covenants, but certain issues should be covered:

- does the agreement take effect immediately upon its signing, or only when it is registered on title? The Yukon and Manitoba legislation states that the agreement is binding only upon registration; however, it may be better for legislation to bind the grantor initially, and then bind subsequent owners when registered.

- who is responsible for registration? This should be the holder (refer to Manitoba legislation for problems associated with having the Minister responsible for registration).

- should senior or municipal governments be notified and given a copy of the covenant (e.g., Manitoba and Nova Scotia)? This may be appropriate to keep government informed and could be accomplished through regular mail to keep costs down.

- how should registration requirements under general land title legislation relate to conservation covenants? This should likely follow the procedures that apply to other types of statutory easements (i.e., pipeline and utility easements).

Covenant Enforcement

Although it is hoped that enforcement of a covenant will not be necessary, mechanisms to do so should be incorporated into legislation. The following questions should be addressed:

- who is responsible for enforcing the conservation covenant: the holder, the grantor, a third party, government?
- under what conditions can a third party or government enforce the covenant?
- can mediation, arbitration or other alternative dispute resolution procedures be set out in the legislation or included in the covenant agreement?
- who should be liable for breach of covenant obligations?
- what remedies are available for breaches of the covenant's terms?
- should a breach of a covenant also be an offense?
- before which level of court or other forum can one enforce a covenant?

The Yukon Act, Alberta Private Member's Bill and the United States Act have clearly set out sections regarding who should be responsible for agreement enforcement. It is generally thought that legislation should allow for voluntary creation of third party rights of enforcement, to be used primarily as a back-up enforcement mechanism. The criteria applied to determine if an organization qualifies as a covenant holder should also be applied to determine if it qualifies as a third party enforcer. For a more detailed discussion of enforcement issues, refer to Loukidelis (1992).

Removal of Certain Restrictions and Rules

One of the primary reasons for wanting new legislation is to eliminate certain restrictions and rules governing common law easements and covenants. Many of these rules are rather obscure and technical, but they can be important and should therefore be considered in drafting or amending conservation covenant legislation.

Most of the existing covenant or easement statutes eliminate four of the most significant legal restrictions. These are:

- that the land subject to a covenant or easement must be nearby to another parcel of land;
- that land subject to a covenant or easement must provide a recognized benefit to that other parcel of land;
- that positive obligations on landowners that require them to spend money doing something on the land will not be enforceable; and
- that a covenant or easement will not bind subsequent landowners to the terms of the agreement unless the document demonstrates an intention to bind the burdened land.

While these problems are generally looked after in new legislation, there are several less obvious obstacles that must be addressed. These deal primarily with how to maintain and enforce covenants after acquisition:

- a covenant will be unenforceable if the land has been used openly for a long period in a manner inconsistent with the covenant's terms, or the covenant holder has allowed such inconsistent use;
- changes in the character of the land or the neighbourhood can make a covenant obsolete and may allow a judge to cancel the covenant;
- an interest in land cannot be enforced except by those who signed the agreement;
- when acquisition of a covenant is subject to an event taking place too far into the future, the covenant would be held to be invalid.

These old case law rules need to be examined, eliminated or altered in order to make the most effective use of conservation covenants.

Assignment, Alteration and Termination

When organizations close down or develop other priorities, but still want to ensure that a conservation covenant is held by an appropriate agency, it may be necessary to pass on or "assign" the agreement and enable this new holder to enforce it. There also needs to be a process to alter or terminate a covenant if unforeseen circumstances arise, or the original purpose of the covenant has been eliminated. This process could specify whether it is solely a matter for the parties involved or also open to government intervention (e.g., Manitoba, Alberta), whether court and/or government approval is required, and whether modifications may be made only under particular circumstances.

One issue that must be examined closely is what happens if an organization holding a covenant dissolves? There are numerous possible solutions which might be considered:

- allow the organization a set period of time (likely six to 12 months) to assign the agreement to another qualified holder (as allowed for other assets held by charities);
- allow a time period for restoration of the organization's status before assignment is required (e.g., British Columbia's Bill 28);
- allow the Minister to assign the covenant to a qualified organization (perhaps as a back-up procedure after first giving the holder a chance to do so itself);
- ensure that all covenants contain a clause which designates a back-up organization to assume the agreement in such a situation;
- require that the articles of incorporation or the by-laws of the organization provide for the assignment to qualified holders upon dissolution of the organization (e.g., Nova Scotia's legislation); or
- have the covenant automatically revert to a specified government Ministry or agency (e.g., Saskatchewan and Newfoundland).

In any case, the consent of the organization to which a covenant might be assigned must be required beforehand in order to ensure that they can meet these new responsibilities.

Relation to Other Legislation

Some of the rules governing the issues raised above may be set out in other statutes. These rules need to be examined to determine whether they are appropriate for the purpose of conservation covenants.

Title Registration and Other Land Rules

The procedures existing in land titles legislation, and whether they are appropriate for the purposes of conservation covenants, must be considered. These procedures may include steps in registering covenants, who can or should do so, and costs involved. The laws governing the circumstances where a landowner can apply to the court to have a covenant cancelled should also be examined to ensure that they are consistent with the purposes of conservation covenants. There must also be consideration of what occurs when someone forecloses on a mortgage that was registered before the covenant was put in place. Exemptions from ordinary mortgage procedures may want to be included in the legislation to ensure that property remains subject to the covenant despite the foreclosure. This type of exemption already exists for utility and pipeline easements.

The procedures existing in land titles legislation, and whether they are appropriate for the purposes of conservation covenants, must be considered.

Property Assessment Taxation

Although some property tax relief would be available without tax reform if the landowner showed that the conservation covenant reduced the value of the land, some law reform is desirable to further encourage the use of conservation covenants. Several types of provisions could be incorporated into the covenant legislation to provide a property tax incentive for entering into these agreements:

- an exemption from property taxes for lands subject to covenants could be made;
- a new assessment class for conservation covenant lands could be established to lower assessments;
- property assessors could be directed to take account of the effects on property values made by covenants, easements and servitudes whether or not there are appurtenant lands that benefit (for example, section 9 of the Ontario *Assessment Act* has separate provisions addressing the reduction in value pursuant to both easements and covenants, although this might only apply to such interests at common law) and;
- property tax rebates could also be established, perhaps related to the significance of the values conserved on the property.

There must also be consideration of what to do when property taxes on land subject to a covenant have not been paid, thus giving the municipality the right to sell the land and collect the taxes from the proceeds. A specific section could be included in new legislation stating that such tax sales are deemed to have been made subject to the conservation covenant, and thus the covenant is not automatically terminated.

Implications For Municipal Treasuries

Legislators and advisors have concluded that any tax ramifications of conservation covenants and easements would be small or neutral for a number of reasons.

If a conservation covenant decreases the assessed value of the land, a possible negative impact of such an agreement could be a reduction of tax revenues to local municipalities. For example, the Sustaining Wetlands Forum (1990) recommended that, "provinces and municipalities should review and, where necessary, revise land assessment and taxation systems to ensure that they do not discourage wetland conservation...". However, they went on to recommend that, "municipalities should be compensated by the province or private sector organizations for losses in their tax base resulting from revisions in assessment procedures...". However, this type of compensation to muncipalities has not appeared to be necessary when covenants and/or easements have been placed on private lands, and recent amendments have proceeded without major opposition on the part of the

municipalities. In fact, the Alberta Association of Municipal Districts and Counties recently passed a resolution requesting the province to provide the legislation necessary to enable the application of perpetual easements.

Legislators and advisors have concluded that any tax ramifications of conservation covenants and easements would be small or neutral for a number of reasons:

- in British Columbia, for example, it was calculated that only a small percentage (0.4%) of the land base would likely be considered by non-governmental organizations for establishment of conservation covenants for habitat protection;
- the number of parcels protected by covenants which also have some development value would likely be small;
- usually the conservation covenant would be placed on rural properties and would usually be structured in such a way as to allow on-going use of developed areas of the properties for existing purposes;
- even in cases where the property might have development or other value relevant to property tax revenues, the covenant would not always affect the whole parcel and, therefore, other uses would still be possible;
- covenants may positively affect land values. The value of the protected parcel itself could increase, since desirable natural features of the protected land may have disappeared on adjacent lands;
- the value of adjacent lands may be positively affected, because their proximity to desirable natural features will be an added amenity;
- covenants would often be placed on lands that are already assessed at low or no value. For example, in Alberta, provincial legislation prescribes that farmland be valued at agricultural use value. This implies that the property be valued on the basis of its current farming use as opposed to the market value of the land. The majority of wetlands in Alberta would be classed as having "no economic agricultural" value and would therefore have no assessed value attributed to them. Other wetlands may be classed as "non-arable land" and rated according to their value as pasture. These lands would generally be assessed at very low values and would result in an insignificant amount of taxes.

For a detailed discussion of property tax issues as well as a profile of assessment systems in Canada, refer to Denhez (1992).

Other Tax Questions

In some provinces, property transfer taxes are assessed. Legislators may want to include in legislation a provision for exemption from paying this tax if there is an expressed intention to register a conservation covenant within a certain time frame. Property transfer tax relief may be given to lands subject to a covenant or easement. For example, the British Columbia *Property Transfer Tax Act* (S.B.C. 1991, c.16) provides relief from tax on the transfer of a property where a covenant in favour of the Crown under section 215(1.1)(e) of the *Land Title Act* is registered with the approval of Cabinet. Similar provisions were included in Ontario's Bill 92, which was not enacted into law.

There are also a number of issues regarding federal taxation. A donation of a conservation easement or covenant to a registered charity would likely qualify under the *Income Tax Act* as a charitable gift for income tax purposes. However, there may be discrepancies regarding the method for assessing the value of the land, and conservation organizations may need to assist landowners in obtaining appraisals and in dealing with Revenue Canada, to reduce the burden to landowners (see Loukidelis (1992) for more information).

In 1992, the North American Wetlands Conservation Task Force, a sub-committee of the North American Wetlands Conservation Council (Canada), in partnership with the National Round Table on the Environment and the Economy published *You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands* (Denhez 1992). This publication outlines the treatment of ecologically sensitive lands under the *Income Tax Act* and various assessment acts within the provinces. Since that time, the North American Wetlands Conservation Council (Canada) with the help of a great many conservation organizations across the country has been working on making such tax and assessment regulations more conservation-friendly. The primary recommendations involving changes to the *Income Tax Act* cited in the report involve the elimination of the Capital Gains Tax to donations of ecologically sensitive real estate, and a lifting of the ceiling on deductible charitable expenditures to permit up to a 100% deduction of income during one year (see Appendix 3 for full recommendations).

The report of the Task Force on Economic Instruments and Disincentives to Sound Environmental Practices, November 1994, recommended the following changes to the *Income Tax Act* regarding the conservation of ecologically sensitive lands in Canada.

Land Donations for Conservation:

"The government should amend the *Income Tax Act* to exempt from capital gains tax all donations of ecologically sensitive land made in perpetuity to all levels of government and charitable institutions.

The government should amend the *Income Tax Act* to equalize the treatment of donations of ecologically sensitive land to charitable institutions and municipalities with similar donations to the Crown. This would involve removing the 20 percent (of net income) cap on deductibility of such donations.

The government should amend the *Income Tax Act* to exempt from capital gains and allow 100 percent (of net income) deductibility of donations of conservation covenants on ecologically sensitive land."

Such changes to the *Income Tax Act* would allow landowners to donate their land for the public good to organizations such as land trusts and would make the use of conservation covenants, easements and servitudes a practical tool for the conservation of land across Canada.

On February 27, 1995, Canada's Minister of Finance announced that the Government intends to amend the Income Tax Act in order to facilitate the donation of privately-owned, ecologically sensitive land, easements, covenants and servitudes, for conservation purposes.

As a direct result of the above reports and recommendations, and approaches to the federal government by numerous organizations, corporations, and municipal and provincial governments, on February 27, 1995, Canada's Minister of Finance announced that the Government intends to amend the *Income Tax Act* in order to facilitate the donation of privately-owned, ecologically sensitive land, easements, covenants and servitudes, for conservation purposes. Through these changes, donations to municipalities and registered charities will be given the same tax treatment as donations to the Crown. The 20% annual limit will be lifted and, in its place, the *Income Tax Act* will allow up to 100% of the donor's taxable income to be offset in any one year. While other recommended changes were not adopted, the federal government has taken a positive step forward in removing existing barriers to private land conservation. However, if further action is not taken at the federal level to change the *Income Tax Act*, provinces should consider appropriate mechanisms within their own jurisdictions to compensate landowners who donate land or covenants on land for conservation purposes which advance the public good and contribute to biodiversity objectives. One such initiative was recently taken by Quebec (the only province that collects its own taxes) which, prior to the federal announcement, announced modifications to their tax laws in order to remove the 20% ceiling on deductibility and help promote the protection of areas of significant ecological value.

When a covenant is not donated and a payment is involved, there are issues to consider regarding the payment/exemption of the Goods and Services Tax (GST). Payment of the GST could amount to a substantial increase in the funds an organization would be required to raise, even if the tax is refunded at a later date. Although only federal legislation can

change the GST itself, provinces and territories may be able to designate certain transfers as being those made by agents of the Crown, and GST may not need to be paid. Alternatively, exemptions from collection of the GST may be made, subject to the filing of an appropriate exemption or rebate qualification certificate.

Care should be taken in wrapping taxation questions up with basic conservation covenant provisions. In general, it may be better that they be kept separate, either in different legislation or different parts of one Act (refer to Loukidelis (1992); Denhez (1992); and Attridge (1994) for more information regarding tax issues).

Planning and Expropriation

Planning and expropriation questions generally have not been considered in conservation covenant legislation, yet a few issues do arise. With regards to severance and planning, covenants covering only part of a lot may be subject to severance approval requirements. That may unduly delay covenant transactions, thus there may want to be provisions stating that conservation covenants be exempt from such severance procedures. Another solution may be to have the covenant cover the entire lot but restrictions govern only a clearly described part of the lot. Further, legislation may want to include a reference regarding restrictions on subdividing once an agreement is in place. This may be particularly important when dealing with covenants on agricultural lands in close proximity to urban areas.

When a property is expropriated, a conservation covenant would ordinarily be invalidated, defeating its original purpose. To resolve this problem, conservation covenants or certain classes of agreements could be made explicitly exempt from expropriation legislation, or be exempt unless explicitly included. Alternatively, expropriation could require a procedure for assessing whether the expropriation serves a more important public interest than the covenant itself. Finally, in the event expropriation does occur, legislation should ensure that an organization holding a conservation covenant be appropriately compensated, either financially or with an equivalent site.

Other Issues to Consider

There are a number of other questions that could be considered in drafting legislation. These include:

- occupier's liability issues, and its related common law and legislation; these should be examined to ensure that covenants that provide for public access do not unnecessarily burden the landowner or occupier with liability for accidents.

- how do conservation covenants relate to aquatic areas, and would they affect water rights and responsibilities?

- how do these interests affect mining rights to the subsurface resources?

- how could conservation covenants affect, or assist in resolving Aboriginal land claims issues?

The issues and questions outlined in this section (see Appendix 4 for a summary), as well as others that will undoubtedly arise, need to be addressed in drafting conservation covenant legislation to ensure that the legislation operates as smoothly and effectively as possible, both when initially creating covenants, and when monitoring and enforcing them over the longer term.

FUTURE DIRECTIONS

Many international and national programs call for plans and programs that protect the ecological health of the world's ecosystems while allowing humankind to pursue a sustainable living. *Our Common Future* by the World Commission on Environment and Development, 1987; *Parks in Progress* by the Fourth World Congress on National Parks and Protected Areas, International Union for the Conservation of Nature and Natural Resources (IUCN), 1993; *Canada's Green Plan* by the Government of Canada, 1990; and the *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity*, a report of the Biological Diversity Working Group, 1994, all touch on the fact that more effort has to be undertaken to involve the private sector in the conservation of the world's resources.

In Canada, as in many other countries, private and corporate groups have begun to work toward that end and, through unilateral efforts or partnerships with governmental organizations, have taken on the challenge of trying to plan and set out programming for sustainable development. But if such governmental bodies expect the private landowner to pull his or her weight to provide long-term sustainability, every effort must be made to modify the major impediments under existing laws, regulations and policies in order to allow such a goal to be accomplished.

What is emerging is two distinct branches of conservation covenant, easement and servitude law in Canada; one where organizations meet certain categories or criteria and thus are automatically qualified to hold such interests, and the second where organizations are assessed by a government department to determine whether they should be designated to hold these interests. The former does not require government involvement to activate, and thus is less likely to slow down or impede conservation activity. Nonetheless, the best legislation probably combines the two, whereby well-known categories of organizations and governments qualify automatically, and others can be assessed on a case-by-case basis. A second split in legislative trends that is becoming more evident as law reform proceeds; legislation that authorizes only the Minister, a specialized government agency, or perhaps even a municipality to hold and register agreements, and statutes that expand this scope to include public-minded, but private, organizations and sometimes even individuals.

As conservationists and others actually use these new provisions, and examine older legislation in this new light, some sections may need fine tuning, and lessons from one jurisdiction will come to be applied in others. Over time, then, we may see another round of reforms leading to more of a convergence and commonality of practice.

Once reforms are brought about, both the public and the private sector must then apply them and promote their use for on-the-ground conservation.

While there is an expanding ability to enter conservation covenants, easements and servitudes across Canada, we must also examine complementary legal reforms to ensure effective, inexpensive and streamlined use of these legal tools. Analysis and reforms could include: land use planning and subdivision controls, and their relationship to property values and ownership options; taxation measures of all sorts, including federal and provincial income tax, property and land transfer taxes, and maintaining covenants and easements despite land sales for defaulted taxes; interaction with incentive programs, such as property tax exemptions or rebates; land registration procedures and expenses; activities and procedures of charities and corporations; land disposition policies; expropriation and injurious affection procedures and valuation; government acquisition strategies and legislation for parks and other protected areas; and likely a host of other measures .[39]

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[39] For a related discussion of this point, see: Ian Attridge, 1992, Legal Developments for Land Trusts. In: *Proceedings of the First Interprovincial Land Trust Conference*, "Tools of Our Trade", October 3-4 1992. Ruiter Valley Land Trust: Dunkin, Quebec.

This report has attempted to outline the use and necessity for conservation easements and covenants along with the existing laws, both common and statute, which are currently in place or being planned for across Canada. It is the hope of the authors that the reader will begin to understand how important the use of conservation easements and covenants is in the toolbox of mechanisms with which the private landowner and/or private conservancy group has to work with to accomplish biodiversity conservation goals on private lands across Canada. It is not sufficient that governmental agencies request private-public partnerships for biodiversity conservation and conservation land management to be formed, without doing their utmost to restructure existing institutional arrangements. Similarly, once reforms are brought about, both the public and the private sector must then apply them and promote their use for on-the-ground conservation. In this way, this institutional restructure can then provide an impetus to establish new, and perhaps unthought-of, mechanisms that can make a public-private partnership leading towards a truly sustainable environment and economy a reality.

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APPENDIX 1

Summary of Existing and Proposed Conservation Easement Legislation in Canada

Summary of Existing and Proposed Conservation Easement Legislation in Canada

Province	Relevant Act(s)	Limitations to Natural Area Preservation*	Use or Status
British Columbia	Land Title Act		• amended by Bill 28, August, 1994 • used by government for private land preservation
Alberta	Land Titles Act	• retains common law requirements	
	Historical Resources Act	• limited easement holders	
	Environmental Protection and Enhancement Act	• does not allow conservation organizations to hold easements • needs designation as natural area	
Saskatchewan	Heritage Property Act	• certificate of purpose required for registration	• easements have not generally been used for heritage property preservation
Manitoba	Heritage Resources Act	• Minister must register	• used by government to protect cultural property
	Crown Lands Act	• applicable only to sale of public land	
Ontario	Ontario Heritage Act	• limited easement holders	• used by the Ontario Heritage Foundation for heritage and natural area preservation
	Conservation Land Act		• amended by Bill 175: Royal Assent: December 8, 1994
Quebec	New legislation is currently being drafted		• will be submitted to the Ministry of the Environment for introduction as a government bill.
New Brunswick	Historic Sites Protection Act	• generally not applicable to natural areas • generally not applicable to natural areas	

Covenants, Easements and Servitudes

Province	Relevant Act(s)	Limitations to Natural Area Preservation*	Use or Status
Nova Scotia	Heritage Property Act	• requires designation as natural area and Cabinet approval of easement	
	Conservation Easement Act	• conservation organization must be designated as such by Cabinet	• two private organizations have been designated • government has finalized its first agreement
Prince Edward Island	Natural Areas Protection Act		• used by government for natural area protection
	Museum Act	• Prince Edward Island Museum and Heritage Foundation is only organization authorized to hold easements	
	Fish and Game Protection Act	• Minister is only qualified holder	• draft form for easements is being put forth to Executive Council
Newfoundland	Historic Resources Act	• limited easement holders	• used by government to protect built environment
Yukon	Environment Act		

* in addition to fact that Heritage or Historic Resource Acts may require a natural area to have specific "heritage" or "historic" value in order to qualify.

APPENDIX 2

State Preservation and Conservation Easement Legislation

State Preservation and Conservation Easement Legislation

I. Generic Easement Legislation (authorizing conveyance of perpetual conservation and preservation easements in gross to qualified agencies and organizations). Note: "UCEA" denotes Uniform Conservation Easement Act or a variation thereof. Information is current as of June 1995.

Jurisdiction	Statutory Citation
Alaska	Alaska Stat. §§ 34.17.010 to 34.17.060 (1990). UCEA.
Arizona	Ariz. Rev. Stat. Ann. §§ 33-271 to 33-276 (1985). UCEA.
Arkansas	Ark. Code Ann. §§ 15-20-401 to 15-20-410 (Michie 1987). UCEA.
California	Cal. Civil Code §§ 815 to 816 (West 1994).
Colorado	Colo. Rev. Stat. §§ 38-30.5-101 to 38-30.5-111 (1990).
Connecticut	Conn. Gen. Stat. Ann. §§ 47-42a to 47-42c (West 1989).
Delaware	Del. Code Ann. tit. 7, §§ 6901 to 6906 (1993).
District of Columbia	D.C. Code Ann. §§ 45-2601 to 45-2605 (1993). UCEA.
Florida	Fla. Stat. Ann. § 704.06 (West 1989); Fla. Stat. Ann. § 193.501 (West 1993).
Georgia	Ga. Code Ann. §§ 44-10-1 to 44-10-8 (1992). UCEA
Hawaii	Haw. Rev. Stat. §§ 6E-15 and 198-1 to 198-6 (1985).
Idaho	Idaho Code §§ 55-2101 to 55-2109, 67-4613 (1989). UCEA.
Illinois	Ill. Ann. Stat. 65 ILCS 5/11-48.2-1A, 505 ILCS 35/1-1 to 35/1-3, 765 ILCS 120/0.01 to 120/6 (Smith-Hurd 1991).
Indiana	Ind. Code Ann. §§ 32-5-2.6-1 to 32-5-2.6-7 (West 1994). UCEA.
Iowa	Iowa Code Ann. §§ 457A.1 to 457A.8 (1993). (for land conservation only).
Kansas	Kan. Stat. Ann. §§ 58-3810 to 58-3817 (1994). UCEA.
Kentucky	Ky. Rev. Stat. Ann. §§ 382-800 to 382-860. (Michie/Bobbs Merrill 1990). UCEA.
Louisiana	La. Rev. Stat. Ann. §§ 9-1271 to 9-1276 (West 1991). UCEA.

Jurisdiction	Statutory Citation
Maine	Me. Rev. Stat. Ann. tit. 33, §§ 476 to 479-B, 1551 to 1555 (1989). UCEA.
Maryland	Md. Real Prop. Code Ann. § 2-118 (1988).
Massachusetts	Mass. Gen. Laws Ann. ch. 132A, §§ 11A to 11D (West 1990); Mass. Gen. Laws Ann. ch. 184, §§ 31 to 33 (West 1994).
Michigan	Mich. Comp. Laws Ann. §§ 15.1816(51) to 15.1816(57) (West 1990).
Minnesota	Minn. Stat. Ann. §§ 84C.01 to 84C.05, 273.117 (West 1990). UCEA.
Mississippi	Miss. Code Ann. §§ 89-19-1 to 89-19-15 (1972). UCEA.
Missouri	Mo. Ann. Stat. §§ 67.870 to 67.910 (Vernon 1989). (for land conservation only).
Montana	Mont. Code Ann. §§ 76-6-201 to 76-6-211 (1989). (for land conservation only).
Nebraska	Neb. Rev. Stat. §§ 76-2, 111 to 76-2, 118 (1990).
Nevada	Nev. Rev. Stat. §§ 111.390 to 111.440 (1989). UCEA.
New Hampshire	N.H. Rev. Stat. Ann. §§ 79-A:1; 79-A:15 to 79-A:21 (1991); N.H. Rev. Stat. Ann. §§ 477:45 to 477:47 (1992).
New Jersey	N.J. Stat. Ann. §§ 13:8B-1 to 13:8B-9 (West 1979).
New Mexico	N.M. Stat. Ann. §§ 47-12-1 to 47-12-6 (Michie 1978). (UCEA but for land conservation only).
New York	N.Y. Envtl. Conserv. Law §§ 49-0301 to 49-0311 (McKinney 1991).
North Carolina	N.C. Gen. Stat. §§ 121-34 to 121-42 (1990).
North Dakota	N.D. Cent. Code § 55-10-08 (1983).
Ohio	Ohio Rev. Code Ann. §§ 5301.67 to 5301.70 (Anderson 1990).
Oregon	Or. Rev. Stat. §§ 2197.467, 271.715 to 271.795 (1993). UCEA
Pennsylvania	(Conservation and preservation easements in gross authorized under common law).
Rhode Island	R.I. Gen. Laws §§ 34-39-1 to 34-39-5 (1984 and 1994); R.I. Gen. Laws § 42-45-9.1 (1994); R.I. Gen. Laws §§ 45-36-1 to 45-36-2 (1991).

Jurisdiction	Statutory Citation
South Carolina	S.C. Code Ann. §§ 27-8-10 to 27-8-80 (Law. Co-op. 1991). UCEA.
South Dakota	S.D. Codified Laws Ann. §§ 1-19B-16, 1-19B-56 to 1-19B-62 (1985). UCEA.
Tennessee	Tenn. Code Ann. §§ 11-15-107 to 11-15-108, 66-9-101 to 66-9-103, 66-9-301 to 66-9-309 (1993).
Texas	Tex. Nat. Res. Code Ann. §§ 183.001 to 183.005 (1978). UCEA.
Utah	Utah Code Ann. §§ 9-8-501 to 9-8-506, 57-18-1 to 57-18-7 (1992).
Vermont	Vt. Stat. Ann. tit. 10, §§ 821 to 823, 6301 to 6308 (1989).
Virginia	Va. Code Ann. §§ 10.1-1009 to 10.1-1016, 10.1-2207 (Michie 1993). UCEA.
Washington	Wash. Rev. Code Ann. §§ 84.34.200 to 84.34.250 (West 1993).
West Virginia	W. Va. Code §§ 20-12-1 to 20-12-8.
Wisconsin	Wis. Stat. Ann. § 700.40 (West 1980). UCEA.

II. States that authorize conveyances of preservation and conservation easements to, or acquisitions by, one or more state agencies as part of agencies' authorizing legislation, but that do not have generic easement legislation.

Alabama

Oklahoma

Puerto Rico

Wyoming

III. No easement legislation or express authorization.

U.S. Virgin Islands

APPENDIX 3

Summary of Recommendations for tax reform cited in
You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands.

Summary of Recommendations for tax reform cited in *You Can't Give It Away: Tax Aspects of Ecologically Sensitive Lands.*

Recommendation No. 1: The legal fiction which attributes deemed capital gains (and potential deemed capital gains tax) to donations of ecologically sensitive real estate should be abolished.

Recommendation No. 2: The ceiling on deductible charitable expenditures (20% of income) should be lifted. Business expenditures have no such ceiling; and there is no policy reason why altruistic donations should be treated less favourably than business expenditures. If the Government of Canada insists on retaining a ceiling, then the ceiling should be the same as in the case of donations to senior governments (100% of income).

Recommendation No. 3: The tax treatment of donations of Canada's natural heritage should be no worse than that now enjoyed by donations of Canada's cultural heritage.

Recommendation No. 4: Charitable donations of covenants or easements, for the protection of ecologically sensitive lands, should not be subject to deemed capital gains or a 20% income limitation, any more than donations of other interests in ecologically sensitive lands.

Recommendation No. 5: Purchases of protective covenants and easements by environmental charities may continue to be subject to GST but should not otherwise trigger tax liabilities such as on deemed capital gains.

Recommendation No. 6: All provinces and territories should be encouraged to amend their property tax assessment/collection legislation, to make specific reference to conservation of ecologically sensitive lands.

Recommendation No. 7: Those references should put ecologically sensitive lands on a par with whatever other private or charitable lands enjoy most-favoured status. The exact mechanism in doing so should correspond to the jurisdiction's established practice for other most-favoured properties.

Recommendation No. 8: The legislation should provide for a tax clawback on conversion of the property.

APPENDIX 4

Summary of Issues to Consider when Drafting Conservation Easement Legislation

Summary of Issues to Consider when Drafting Conservation Easement Legislation

Issue	Main points to consider	Examples/References
Purpose	• general environmental protection?	• Yukon, British Columbia, United States Acts
	• maintenance of existing land uses?	
	• historical preservation?	
Grantors	• private landowner?	• Attridge (1994)
	• government and associated agencies?	
Holders	• criteria for holders set out in legislation?	• Yukon, Manitoba, Prince Edward Island
	• government can designate eligible organizations?	• Saskatchewan, Nova Scotia, Newfoundland, British Columbia
	• what types of organizations should be able to hold easements?	• Loukidelis (1992), Attridge (1994)
Registration	• when does easement take effect?	• Attridge (1994)
	• who is responsible for registration?	
Enforcement	• who is responsible for enforcement?	•Yukon, Alberta Bill 211, United States
	• liability for breach of obligations?	• Loukidelis (1992)
	• remedies for breach of obligations?	
Removal of existing restrictions	• common law requirements (i.e., dominant and servient tenement)	• Loukidelis (1992)
	• other old case law rules that could invalidate an easement	
Assignment, alteration, termination	• provision for assignment of easement to other qualified holder	• Ontario Bill 175, Alberta Bill 211, Nova Scotia
	• process for alteration or termination of easement	• United States, Yukon
	• solutions for when an organization holding an easement dissolves	• British Columbia, Ontario Bill 175, Nova Scotia, Saskatchewan, Newfoundland

Issue	Main points to consider	Examples/References
Taxation issues	• property taxation	• Denhez (1992), Loukidelis (1992), Attridge (1994
	• implications for municipalities	
	• other tax questions (i.e., GST, income tax deductions)	
Title registration and other land rules	• are procedures existing in land titles legislation appropriate for conservation easements?	• Attridge (1994)
	• exemptions from ordinary mortgage procedures (as with utility easements)	
Planning and expropriation	• how to deal with easements covering only part of a lot?	• Attridge (1994)
	• subdivision restrictions?	• British Columbia
	• exemptions from expropriation legislation?	• Kwasniak in Environmental Law Centre (1994)
Other issues to consider	• occupier's liability	• various papers in Environmental Law Centre (1994)
	• mining rights and subsurface resources	
	• aboriginal land claims issues	